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QUESTIONS PRESENTED

Respondent, CF&I Steel Corporation, submits that the following questions are presented for review:

1. Did the judgment of the Tenth Circuit Court of Appeals correctly affirm the order of the Occupational Safety and Health Review Commission vacating the citation issued by the Secretary of Labor against the Respondent, CF&I Steel Corporation?

2. Did the Tenth Circuit Court of Appeals correctly defer to the reasonable interpretation of the Occupational Safety and Health Review Commission over the unreasonable interpretation of the Secretary of Labor, when the two agencies differed on the interpretation of the ambiguous regulatory provisions at issue?

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MISCELLANEOUS:

S. 2193, 91st Cong., 1st Sess. § 6 (1969); *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* (1971) 15, 16

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent sections of the Occupational Safety and Health Act of 1970 and the regulatory standards are set forth in the Appendix portion of the Petition for Writ of Certiorari. References are made throughout this brief to Petitioner's Appendix by citing *App.* and the appropriate page number.

There are three regulatory standards relevant to the issues before the Court. The first two standards set forth below, 29 C.F.R. § 1910.1029(g)(3) and 29 C.F.R. § 1910.1029(g)(4)(i), were promulgated by the Secretary as a part of the coke oven regulations. The third standard below, 29 C.F.R. § 1910.134(e)(5), was a national consensus standard authored by the American National Standards Institute and adopted by the Secretary without the notice and comment rulemaking procedures of the Act:

29 C.F.R. § 1910.1029(g)(3):

> (3) *Respirator program.* The employer shall institute a respiratory protection program in accordance with § 1910.134 of this part.

29 C.F.R. § 1910.1029(g)(4)(i):

> (4) *Respirator usage.* (i) The employer shall assure that the respirator issued to the employee exhibits minimum facepiece leakage and that the respirator is fitted properly.

29 C.F.R. § 1910.134(e)(5):

> (e) *Use of respirators.* (5) For safe use of any respirator, it is essential that the user be properly instructed in its selection, use, and maintenance. Both supervisors and workers shall be so instructed by competent persons.

> Training shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and finally, to wear it in a test atmosphere.

STATEMENT OF THE CASE

This case arises under the Occupational Safety and Health Act of 1970 ("the Act"), and involves a citation[1] issued by the Secretary of Labor to CF&I Steel Corporation.[2] The Occupational Safety and Health Review Commission vacated the citation, holding that the Secretary had failed to prove that CF&I was not in violation of the regulatory standards cited by the Secretary. The Secretary disagreed with the Commission's interpretation of the regulatory standards and appealed the Commission's final order. On appeal, the Tenth Circuit Court of Appeals affirmed the Commission's decision, holding that the decision was based

[1] Although the Secretary issued more than one citation initially, Petitioner concedes in footnote 10 of its brief that there is only one part of one citation at issue in the present case.

[2] In accordance with Supreme Court Rule 29.1, CF&I informs this Court that there are, at the present time, no parent companies of CF&I; however, the following are subsidiaries of CF&I: Albuquerque Metals Company; CF&I Fabricators of Colorado, Inc.; CF&I Fabricators of Utah, Inc.; Colorado and Utah Land Company; The Colorado and Wyoming Railway Company; Denver Metals Company; The Foundation Sand & Gravel Company; Kansas Metals Company; Pueblo Metals Company; and Pueblo Railroad Service Company.

upon a reasonable interpretation of the regulatory standards at issue. The Secretary has sought certiorari review by this Court.

In 1979, the Secretary conducted an inspection of CF&I's coke oven plant which is located in Pueblo, Colorado. Based upon her belief that 28 employees had failed their respirator fit test and were allowed to enter a regulated area, the Secretary cited CF&I for a violation of 29 C.F.R. § 1910.1029(g)(3). Specifically, the citation reads as follows:

> 29 C.F.R. § 1910.1029(g)(3): The employer did not institute a respiratory protection program in accordance with 1910.134 of this part, in that; Respiratory Training did not provide the employees an opportunity to have their respirator fitted properly and test its face-piece-to-face-seal:
>
> (a) 28 Coke oven employees working in the regulated area exposed to Coke oven emissions failed their respirator fit test and were not provided with a different respirator which would fit.[3]

[3] Part (b) of the original citation also alleged that CF&I had violated 29 C.F.R. § 1910.1029(g)(3) because:

> (b) 30 Coke oven employees working in the regulated area exposed to Coke oven emissions were not qualitatively fit-tested to determine if their respirators did fit.

App. 76a. However, as Petitioner has conceded in Footnote 10 of its brief, this portion of the citation was not upheld by the Administrative Law Judge, and the Secretary has not challenged that ruling in this proceeding. Petitioner's brief at p.11.

App. 76a. The Secretary believed that the alleged violation was willful[4], and proposed a fine of $10,000.[5]

CF&I filed a notice of contest pursuant to 29 U.S.C. § 659(c), contending that it had not violated § 1910.1029(g)(3). The Secretary notified the Commission of CF&I's intent to contest the citation (See 29 U.S.C. § 659(c)), and the matter was set for hearing before an Administrative Law Judge ("ALJ") of the Commission. See 29 U.S.C. § 661(i).

The ALJ conducted a hearing and upheld only that portion of the citation pertaining to the allegation that 28 employees had failed their respirator fit test and were not provided with respirators which would fit.[6] App. 57a-61a. In the ALJ's opinion, CF&I violated 1029(g)(3) because it had not complied with 29 C.F.R. § 1910.134(e)(5), a regulatory standard incorporated by reference in 1029(g)(3) and governing the training and instruction for the selection, use and maintenance of respirators.

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[4] Under the provisions of the Act, violations may be classified as either willful or repeated, serious or not serious. 29 U.S.C. § 666(a)-(c).

[5] Pursuant to 29 U.S.C. § 666(i), only the Commission has authority to assess civil penalties, however, fines are proposed by the Secretary in the first instance. See 29 U.S.C. § 659.

[6] It is undisputed that these 28 employees were provided with a qualitative fit test, known as the "banana oil" test (App. 78a), and therefore, there is no issue regarding the interpretation of "test atmosphere" or "atmospheric testing," since those issues arose in reference to part (b) of the citation, which is not before this Court. Accordingly, the arguments advanced by the AFL-CIO as *amicus curiae* in this proceeding regarding "atmospheric testing" are irrelevant.

On review, the Commission reversed the decision of the ALJ and vacated the citation. The Commission rejected the Secretary's argument that 134(e)(5) required an employer to assure that a respirator is fitted properly. App. 40a. The Commission's reasoning in rejecting the Secretary's argument was two-fold: (1) the plain language of 134(e)(5) indicates that it is a training standard designed to instruct and train employees on such things as how to select a respirator, how to put on a respirator, how to achieve a proper fit and how to obtain a face-piece seal, and therefore, since CF&I had provided its employees with adequate training and instruction[7], the Secretary failed to prove a violation of 1029(g)(3) (App. 41a); and (2) accepting the Secretary's "interpretation" of 134(e)(5) would eliminate the purpose and meaning of 29 C.F.R. § 1910.1029(g)(4)(i), which specifically covers an employer's duty to assure proper fit of a respirator.

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[7] In support of its conclusion that the training and instruction was adequate, the Commission specifically cited the findings and testimony of compliance officer, Gerald Ryan, who conducted the inspection of CF&I on behalf of the Secretary:

> Compliance officer Ryan testified that before they were assigned to the regulated areas, CF&I employees were given a respirator, told when to use it, and shown how to perform a positive-negative pressure test. [Footnote omitted] They were also shown a film illustrating the various types of respirators, their use and proper function, use of a banana oil (isoamyl acetate) atmosphere for fitting, and how to place and fasten a respirator properly, including tightening for good fit. Ryan testified that CF&I also gave the employees a banana oil test. (App. 37a-38a.)

The Commission further noted that rather than attempt to amend the citation to reflect a violation of 1029(g)(4)(i),[8] the Secretary, instead, chose to maintain its "interpretation" of 1029(g)(3). App. 44a. As a result of the Secretary's position, the Commission was faced with the sole question of "whether the Secretary had proven a violation of section [1029(g)(3)]." *Id.* In addressing this specific issue, the Commission concluded that CF&I provided proper training and instruction to its employees, and therefore, the Secretary had failed to establish a violation of 1029(g)(3).[9] App. 45a.

On appeal, the Tenth Circuit Court of Appeals affirmed the decision of the Commission. The court first addressed the discrepancy in the interpretation of the regulatory provisions between the Secretary and the

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[8] In footnote 8 of its brief, Petitioner correctly notes that the original citation was amended by the Secretary to reflect a violation of 1029(g)(3), instead of (b)(3). However, the Secretary at no time attempted to amend the citation to allege a violation of 1029(g)(4)(i), instead of 1029(g)(3). The Secretary instead has chosen to "interpret" 1029(g)(3), rather than issue a citation under 1029(g)(4)(i). Therefore, the issue is not whether CF&I's conduct was proscribed by regulation, but rather, the issue is whether the Secretary may "interpret" a regulatory standard in such a manner so as to prohibit conduct which is specifically addressed by a different regulatory standard.

[9] In reaching its conclusion, the Commission found that employees of CF&I were given the opportunity to handle a respirator under various conditions and to wear the respirator in a test atmosphere under the guidance of an industrial hygienist. App. 45a. The Commission concluded that "[t]he fact that some employees detected the banana oil while in the test atmosphere does not establish by itself that the instructions or training otherwise provided were inadequate." *Id.*

Commission, and noted the conflict between the circuit courts on the issue of whether deference should be accorded to the Commission's interpretation or the Secretary's. App. 4a. The court then consulted the language of the Act and the legislative history behind the creation of the Commission, and determined that deference to the Commission's interpretation was appropriate in those circumstances when the Secretary has promulgated an ambiguous regulatory standard and the Commission has interpreted the standard in a manner well within the plain meaning of the regulation. The court said:

> [W]here the Secretary has failed to convey the meaning of an OSHA regulation to those charged with construing it, and where the Commission has given the regulation an interpretation well within the plain meaning of the terms of the regulation, we will defer to the interpretation of the Commission. [citation omitted] If the Secretary believes that the Commission has interpreted a regulation in a manner inconsistent with OSHA's goals, it may be necessary to amend or clarify that regulation.

App. 7a. In reaching its decision, the court was careful, however, to note the unique roles of the Commission and Secretary under the Act and that another result may prevail under a different statutory framework:

> Although we hold that, under OSHA, deference is properly accorded to the regulatory interpretations of the Commission, we recognize that another result may prevail under a different statutory framework. We further stress that our holding not be construed as a carte blanche for the Commission to overturn settled regulatory interpretations of the Secretary. The Secretary's unique policy and rulemaking role requires that

> her regulatory interpretations be accorded substantial weight by the Commission and contravened only if clearly wrong or in the presence of genuine ambiguity. Because we find the regulations in the instant case to be ambiguous, we defer to the interpretation enunciated by the Commission, insofar as it is reasonable.

App. 9a.

The court examined the language of the regulatory standards at issue and scrutinized the Commission's interpretation of those standards. In concluding that the Commission's interpretation of the standards was reasonable, the court noted that "[w]hile it is certainly possible to reach an alternate interpretation of the ambiguous regulatory language contained in 29 C.F.R. § 1910.1029, we defer to the interpretation chosen by the Commission."[10] App. 11a.

SUMMARY OF ARGUMENT

The Tenth Circuit Court of Appeals correctly affirmed the Order of the Commission vacating the citation issued by the Secretary to CF&I. The Commission's

[10] Because the court of appeals opined that deference was owed to the reasonable interpretation of the Commission, the Secretary's interpretation of the regulatory standards at issue was never subjected to judicial scrutiny. Thus, contrary to the arguments of AFL-CIO as *amicus curiae*, there has never been a decision that the Secretary's interpretation of the regulatory standards was reasonable. As argued in this brief, *infra* pp. 23-29, the Secretary's interpretation of the regulatory standards is contrary to the plain language of the regulations and would not withstand judicial scrutiny.

order was based upon a reasonable interpretation of the regulatory standards at issue and was consistent with the plain language of the standard; whereas, if accepted, the Secretary's interpretation would have violated well established rules of construction. Therefore, deference to the Commission's reasonable interpretation of the regulatory standards was proper under the facts and circumstances of the present case.

1. In those instances under the Act when the Secretary's interpretation of a regulatory standard is clearly wrong or when the regulatory standard is genuinely ambiguous, the Court of Appeals properly held that deference should be accorded to the Commission's reasonable interpretation. As the adjudicator of contested citations, the Commission's function is to affirm, modify or vacate the Secretary's citation, or direct other appropriate relief. This function necessarily includes the power to declare the law by interpreting regulations and is necessary and important to preserve the notice and due process rights of employers. The Commission was created specifically in response to business concerns that the Secretary would be a biased adjudicator of regulatory standards.

Moreover, the Commission's ability to interpret regulations is consistent with the congressional intent of the Act and does not infringe upon the Secretary's rulemaking and policymaking functions under the Act. The Commission is composed of persons who possess special training, education and expertise necessary to interpret regulatory standards and apply them to a given factual setting. This special training, education and expertise makes the Commission uniquely qualified to interpret

regulatory standards and apply them to a given factual setting. Furthermore, the Commission's ability to interpret and apply regulations is consistent with the Secretary's role as rulemaker and ensures that she will promulgate unambiguous regulatory standards, which she is obligated to do under the Act, or utilize the proper rulemaking process to amend or clarify ambiguous regulatory standards.

2. Deference to the Commission's reasonable interpretation of the regulatory provisions was particularly appropriate under the facts and circumstances of the present case. Any deference which is owed to an agency's interpretation of a regulatory standard is only owed to the *reasonable* interpretation of the agency. Since the facts and circumstances of this case demonstrate that the Secretary's interpretation of the regulatory standards was unreasonable and inconsistent with the plain language of the standards, the Tenth Circuit properly deferred to the reasonable construction given the standards by the Commission.

Additionally, deference is normally accorded to an agency because of expertise and because of authorship. *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1332 n.10 (6th Cir. 1978). The Commission members are required to have the necessary expertise and training to interpret regulations. Since the Secretary did not promulgate 134(e)(5), but merely adopted the standard from a national consensus standard promulgated by the American National Standards Institute, no deference was owed to the Secretary's unreasonable interpretation of the regulatory standard.

3. In no event should this Court establish a uniform rule of deference to the Secretary's interpretation of a regulatory standard under all circumstances. In order to preserve the integrity and function of the Commission, a reviewing court should be allowed to scrutinize both the Secretary's interpretation and the Commission's interpretation of a regulatory standard, and deference should be afforded to the most reasonable interpretation of the regulatory standards at issue, giving due consideration to the notice rights of the employer and to the interpretations of both the Commission and the Secretary, as well as the purpose and plain language of the regulatory standards at issue. This approach would preserve the respective roles of the Commission and the Secretary, and at the same time maintain the integrity and function of the Commission as an autonomous, independent and quasi-judicial body.

ARGUMENT

I. THE TENTH CIRCUIT COURT OF APPEALS PROPERLY HELD THAT DEFERENCE IS OWED TO THE COMMISSION'S REASONABLE INTERPRETATION OF AN AMBIGUOUS REGULATORY STANDARD.

In holding that it would defer to the Commission's reasonable interpretation of the regulatory standards at issue, the court of appeals identified two situations when deference to the Commission's reasonable interpretation would be particularly appropriate: (1) when the Secretary's interpretation was clearly wrong, and (2) when the Secretary has failed to convey the meaning of a regulation

by promulgating a genuinely ambiguous regulatory standard. The court directed, however, the Commission to accord substantial weight to the regulatory interpretations of the Secretary. The holding by the court of appeals properly recognized the respective roles and functions of the Commission and the Secretary and was a proper ruling under the facts and circumstances of the present case.

A. As adjudicator, the function of the Commission is to interpret regulations, including ambiguous regulatory standards.

Under the enforcement procedures of the Act, the Secretary is charged with the prosecutorial responsibilities of issuing citations[11] and proposing penalties when she believes that an employer has violated a regulatory standard. See 29 U.S.C. § 659(a). If the employer contests the citation[12], the Secretary must notify the Commission, and the Commission must thereafter afford the employer an opportunity for a hearing in accordance with Section 554 of Title 5.[13] See 29 U.S.C. § 659(c). This

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[11] This responsibility includes the obligation to specify the exact standard which the employer is alleged to have violated. See 29 U.S.C. § 658(a).

[12] If an employer does not contest the citation or fails to notify the Secretary within fifteen (15) days of the intent to contest the citation, the citation and the assessed penalty become the final order of the *Commission*, not the Secretary. 29 U.S.C. § 659(a). Moreover, the Commission is the final authority of all enforcement actions brought by the Secretary. *Id.*

[13] 5 U.S.C. § 554 (1966) is entitled "adjudications", and recognizes the need for resolution of issues of both fact and law. See 5 U.S.C. § 554(b)(3).

adjudicatory hearing must be held in accordance with the Administrative Procedure Act, and must advise the employer of the matters of fact and law asserted.[14] See 5 U.S.C. § 554(b)(3). Thus, the provisions of the Act contemplate that the Commission will act as an adjudicator over matters of fact and law asserted at the hearing. See 29 U.S.C. § 659.

After it conducts the adjudicatory hearing, the Commission has the responsibility to issue an order based on findings of fact. 29 U.S.C. § 659(c). This order may affirm, modify or vacate the Secretary's citation or proposed penalty, or direct other appropriate relief. *Id.* The Commission's authority to modify a particular citation or to direct other appropriate relief necessarily encompasses the ability of the Commission to interpret regulations and apply them to a given factual setting. As the Tenth Circuit Court of Appeals concluded, this ability is within the normal complement of adjudicative powers possessed by traditional administrative agencies (App. 7a), and has been delegated by Congress to the Commission in accordance with 5 U.S.C. § 554 and the provisions of the Act. See also *Chevron, U.S.A., Inc.*, 467 U.S. at 845; *Accord*

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[14] Contrary to the assertions of Petitioner and *amicus curiae* AFL-CIO, nothing in the provisions of the Act limit the adjudicatory authority of the Commission under 5 U.S.C. § 554. The absence of such a limitation supports the conclusion that the Commission has been afforded the full spectrum of adjudicatory powers normally given to an administrative agency, including the ability to interpret ambiguous regulations. See *Department of Treasury, I.R.S. v. FLRA*, 110 S.Ct. 1623, 1629 (1990); *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699-700 (1984); *United States v. Shimer*, 367 U.S. 374, 383 (1961).

Moreover, the adjudicatory power of the Commission to interpret regulations and modify citations is complimented by the composition of the Commission. Pursuant to § 661(a) of the Act, the Commission is composed of three (3) members appointed by the President, by and with the advice and consent of the Senate. These members are appointed from among persons who by reason of training, education or experience are "qualified to carry out the functions of the Commission[.]" *Id*. This expertise makes the members of the Commission uniquely qualified to exercise the normal complement of adjudicatory powers possessed by traditional administrative agencies, including the ability to interpret and apply regulatory provisions.

In authorizing the Commission to carry out its functions, the Act empowers the chairman of the Commission to appoint ALJs as he deems necessary to assist in the performance of the Commission's functions. 29 U.S.C. § 661(e). These ALJs are appointed to "hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith." 29 U.S.C. § 661(j). The decision of the ALJ becomes the final order of the Commission, unless the Commission members determine that the ALJ's decision should be reviewed by the Commission.[15] Nothing in this elaborate and detailed statutory scheme limits the adjudicative

[15] Pursuant to § 661(f), two members of the Commission are necessary to constitute a quorum, and official action can be taken only on the affirmative vote of at least two members.

powers of the Commission. Indeed, the unique composition of the Commission and the statutory grant of full adjudicative powers confirms that the Commission, as adjudicator, has been given the authority and responsibility to interpret regulations.

As the adjudicator of contested citations with the power and responsibility to affirm, modify, vacate or direct other appropriate relief, the Commission is necessarily responsible to interpret the meaning and effect of a particular regulatory standard as applied to a given factual setting. Without such ability, the purpose and function of the adjudicator is frustrated, especially given the elaborate statutory scheme and composition of the Commission under the Act. Accordingly, when a particular segment of an agency has been created as an adjudicator with the function, authority and expertise to interpret and apply regulations, any deference to an interpretation of an ambiguous regulation should be given to that segment of the agency designed and created for that particular purpose.

B. Affording deference to the Commission's reasonable interpretation of an ambiguous regulatory standard is consistent with the congressional intent of the Act.

As explained by the court of appeals, when the Act was first proposed it vested adjudicatory power with the Secretary. See S. 2193, 91st Cong., 1st Sess. § 6 (1969), *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 11-13 (1971) ("*Legislative History*"). The proposal was met with strong concern and

opposition by business and industry. The opponents argued that combining prosecutorial and adjudicative authority in the Secretary would produce biased results against employers. See *Legislative History* at 463-64. In response to business and industry concerns and opposition, Congress withdrew the adjudicative authority from the Secretary, and created the Commission as an autonomous and independent, quasi-judicial body. *Id.* at 462, 465. While rulemaking remained with the Secretary, the Commission was created as the neutral decision maker, where industry and business could obtain fair and unbiased adjudications and applications of regulatory standards to particular factual circumstances.

The congressional intent of the Act has been furthered by the Tenth Circuit Court of Appeals' approach in the present case. As the court of appeals held, "[t]he Secretary's unique policy and rulemaking role requires that her regulatory interpretations be accorded substantial weight by the Commission and contravened only if clearly wrong or in the presence of genuine ambiguity." App. 9a. The directive by the court of appeals carefully balances the respective roles of the Secretary and the Commission by obligating the Commission to respect the interpretations of the Secretary, but at the same time, allowing the Commission to exercise its independent adjudicative powers in those circumstances when the Secretary's interpretation is clearly wrong or when the Secretary has failed to convey the meaning of a regulatory provision by promulgating a genuinely ambiguous standard. This approach is a balanced and well-reasoned one which compliments the unique roles of both the Secretary

and the Commission, and furthers the purpose and function of the Commission and the congressional intent of the Act.

C. The Commission's ability to interpret regulations, including ambiguous regulatory standards, is not inconsistent with the Secretary's role of promulgating standards.

Under the provisions of the Act, the Secretary is charged with the responsibility to promulgate rules and regulations. See 29 U.S.C § 655. This responsibility is accomplished through the standard rulemaking procedures designed to afford interested persons with notice of the proposed regulation and its meaning and the opportunity to participate in the agency regulatory process. See 29 U.S.C. § 655(b); 5 U.S.C. § 553(e). It is the Secretary's responsibility and function to promulgate clear and unambiguous standards. *Bethlehem Steel Corp. v. OSHRC*, 573 F.2d 157, 161 (3rd Cir. 1978). By allowing the Commission to exercise its legitimate adjudicatory power to interpret and apply regulations promulgated by the Secretary, the Secretary is forced to promulgate clear and unambiguous standards which can guide an employer in providing a safe and healthful environment for its workers.

Not only does the Commission's ability to interpret regulations require the Secretary to promulgate clear and unambiguous standards, but it also furthers the purpose for which the Commission was created. As stated earlier, the Commission was designed to alleviate business concerns that the Secretary would not be an unbiased adjudicator of citations and interpreter of regulations. By

design, the Commission was created, therefore, in order to provide industry with a neutral decision maker that would be sensitive to employer's concerns regarding ambiguous regulatory standards. In other words, the Commission was created for the purpose of providing employers with a neutral, independent and autonomous body which would interpret and apply regulations fairly, based upon the facts and circumstances of a given situation.

This role by the Commission in adjudicating and interpreting regulations, especially ambiguous ones, does not infringe upon the role of the Secretary as rulemaker under the Act. As the Tenth Circuit's opinion indicates, settled regulatory interpretations of the Secretary are to be accorded substantial weight by the Commission and contravened only if clearly wrong or in the presence of genuine ambiguity. App. 9a. Thus, in those instances when the Secretary has promulgated a clear and unambiguous regulatory standard, which she is obligated and entrusted to do, her interpretations are accorded appropriate weight necessary to administer and implement statutory policy. However, when the Secretary's interpretation is clearly wrong or when she has failed to promulgate a clear and unambiguous regulatory standard, it is the role of the Commission to act as a neutral and fair interpreter of the regulation, so as to assure employers that they are not subjected to biased and unfair treatment. Hence, the creation of the Commission as the adjudicator and interpreter of ambiguous regulations promulgated by the Secretary is not only consistent with the congressional intent of the Act, but serves as a fair and equitable compliment to the Secretary's role as

rulemaker, and assures that the Secretary will promulgate clear and unambiguous standards necessary to guide the actions of employers.

II. THE JUDGMENT OF THE TENTH CIRCUIT PROPERLY AFFIRMED THE REASONABLE INTERPRETATION OF THE COMMISSION, ESPECIALLY GIVEN THAT THE SECRETARY'S INTERPRETATION OF THE REGULATORY STANDARDS WAS UNREASONABLE.

The actual issue presented by the merits of this case is not as broad as merely whether deference is owed to the Commission over the Secretary under the Act. Although the court of appeals opined that deference is properly owed to the Commission's reasonable interpretations under the Act, "[t]his Court reviews judgments, not opinions." *Chevron U.S.A. Inc.*, 467 U.S. at 842.[17] More importantly, the issues before this Court cannot be viewed without regard to the facts and circumstances of the case, as well as the regulatory standards at issue and the unreasonable interpretation proposed by the Secretary.[18] Contrary to Petitioner's implications, this

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[17] See also *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956) (court's duty is to look beyond opinions to determine precise grounds of judgment); *J. E. Riley Investment Co. v. Commissioner*, 311 U.S. 55, 59 (1940).

[18] Petitioner's entire brief relies heavily upon the argument that deference should be accorded to the Secretary over the Commission, without any justification or defense of the interpretation reached by the Secretary of the regulatory standards at issue. Thus, Petitioner contends that a reviewing court

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case does not present a situation where the Secretary and the Commission have both reached reasonable interpretations of the same regulatory standard; but rather, the question presented by the facts of this case is whether a reviewing court should defer to the Commission's reasonable interpretation of a regulatory standard as opposed to the unreasonable interpretation of the Secretary.

A. Based upon the plain language of the regulatory standards, the Commission reasonably concluded that CF&I had not violated the standards cited by the Secretary.

It is a well established rule of law that an administrative regulation must be construed in accordance with the plain language of the regulation. *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Diamond Roofing Co., Inc. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1979). When an administrative agency has failed to convey the meaning of a regulation which may impose civil or criminal penalties, the regulation must be enforced according to the actual wording used, and not by the wording the agency wished it had used. *Diamond Roofing Co., Inc.*, 528 F.2d at 649. If the regulation misses the mark, fault lies with the author of the regulation and the chosen wording – "a matter easily remedied under the flexible regulation promulgating structure" of the Act. *Id.*

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should always defer to the interpretation of the Secretary, regardless of whether that interpretation is reasonable. Such a rule of deference is not warranted by the facts of this case and ignores the adjudicatory function of the Commission.

In the present case, the Commission exercised its legitimate adjudicatory functions necessary to determine whether the Secretary had proven a violation of the cited regulatory standards when it interpreted the standards in accordance with their plain language. In addressing the Secretary's contention that CF&I had violated 134(e)(5), the Commission relied upon the plain language of 134(e)(5) and concluded that the first and second sentences of the standard required only that users of respirators be instructed properly in the selection, use, and maintenance. The first two sentences of the standard read:

> (5) For safe use of any respirator, it is essential that the user be properly instructed in its selection, use, and maintenance. Both supervisors and workers shall be so instructed by competent persons.

App. 40a. The Commission then scrutinized the remainder of 134(e)(5) and concluded that the standard required an employer to instruct employees only during training in such things as how to select a respirator, how to put on a respirator, how to achieve a proper fit of a respirator and how to obtain a face-piece seal. The remainder of the standard reads:

> Training shall provide the men [sic] an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere.

App. 41a. The Commission further concluded that the standard required an employer to provide hands-on-experience with respirators and an opportunity to wear

the respirator during training. App. 41a. Nothing, however, within the plain language of the cited standard required an employer to assure proper fit of the respirator or specify how proper fit was to be accomplished. Therefore, because all 28 coke oven employees had been provided with adequate training and instruction in accordance with 134(e)(5), the Commission reasonably concluded that the Secretary had failed to prove a violation of the cited standard.

The Commission's conclusion that 134(e)(5) was a training standard was reasonable. First, the language of the standard clearly states that the user of a respirator is to be properly *instructed* in the selection, use and maintenance of the respirator. Second, the standard also states that *training* of employees shall provide *an opportunity* to use and test the respirator. However, nothing in the standard requires an employer to assure proper fit of a respirator, nor does the standard specify the testing methods necessary to accomplish such fit. Rather, as the Commission correctly concluded, assuring proper fit of a respirator is covered by 1029(g)(4)(i). Thus, the Commission's interpretation was reasonable and comports with the plain meaning and language of 134(e)(5).[19]

As further support for its interpretation that 134(e)(5) did not require an employer to assure proper fit of a respirator, the Commission recognized the principle of

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[19] In upholding the Commission's decision to vacate the citation, the Tenth Circuit noted that the plain wording of the incorporated 134(e)(5) covered "training", and that nothing in the standard required an employer to insure proper fit of each employee's respirator. App. 10a-11a.

construction that "a statute or regulation must be read as a whole and that all parts of the statute, if at all possible, are to be given effect." App. 41a.[20] Guided by this principle, the Commission scrutinized the language of 1029(g)(4)(i) and concluded that this regulatory standard not cited by the Secretary was designed specifically to cover an employer's duty to assure proper respirator fit:

> (4) *Respirator usage.* (i) The employer shall assure . . . that the respirator is fitted properly.

App. 122a. By scrutinizing the plain language of both 134(e)(5) and 1029(g)(4)(i), and by attempting to construe the regulation as a whole and give meaning to all parts and standards, the Commission correctly and reasonably concluded that 134(e)(5) could not be interpreted reasonably to require an employer to assure proper fit of a respirator, since 1029(g)(4)(i) was specifically designed to cover such a safety requirement.

B. The Secretary's purported interpretation of 1029(g)(3) and 134(e)(5) is an impermissible construction of the regulatory provisions and, therefore, is not entitled to any deference.

An administrative agency's interpretation of a regulation is entitled to deference only if the construction is

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[20] See *Fidelity Federal Savings & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 163 (1982); *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 513 (1981); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633-634 (1973); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-308 (1961); *United States v. Menasche*, 348 U.S. 528, 538-539 (1955).

reasonable and not inconsistent with the plain language of the regulatory provisions. *Chevron U.S.A. Inc.*, 467 U.S. at 843-845. A regulation must be construed according to the plain language of the standard, and not in a manner that deprives employers of fair notice of the standard's requirements. See *Usery v. Kennecott Cooper Corp.*, 577 F.2d 1113, 1119 (10th Cir. 1977); *Diamond Roofing Co., Inc.*, 528 F.2d at 650.

In the present case, the Secretary issued CF&I a citation for violation of 1029(g)(3) on the basis that 28 coke oven employees allegedly had failed a qualitative fit test[21] and were not provided with a different respirator. When first issued, the citation erroneously cited CF&I for a violation of § 1910.1029(*b*)(3). The Secretary subsequently amended the citation to indicate a violation of 1029(g)(3), despite the fact that 1029(g)(4)(i) specifically covered the alleged conduct cited by the Secretary. Rather than cite the directly applicable regulatory standard or amend the citation accordingly, the Secretary has chosen instead to "interpret" 1029(g)(3) to its liking and indirectly prohibit the conduct directly proscribed by

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[21] As mentioned previously in footnote 6 of this brief, there is no controversy that each of the 28 employees were given a qualitative fit test in a "test atmosphere", and that the employees received instruction and training on the proper care and use of the respirators. Therefore, contrary to the statement of the AFL-CIO as *amicus curiae*, this case does not involve a question of whether "atmospheric testing" is required by the regulatory standards at issue, nor does this case involve any issue regarding the interpretation of "test atmosphere" under 134(e)(5). Rather, the sole interpretation at issue concerns the Secretary's position that 134(e)(5) requires an employer to assure proper fit of a respirator.

1029(g)(4)(i). Not only is such an approach by the Secretary unreasonable,[22] but as the Commission concluded, the Secretary's interpretation of 1029(g)(3) ignores the plain language of the regulatory standard and renders 1029(g)(4)(i) superfluous and without meaning.

Section 1029(g)(3) provides: "(3) *Respirator program.* The employer shall institute a respiratory protection program in accordance with § 1910.134 of this part." Nothing in the plain language of 1029(g)(3) indicates that an employer is required to assure proper fit of a respirator. Rather, the Secretary relies exclusively upon the incorporation of 134(e)(5)[23] as the basis for construing

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[22] If the Secretary's position that she may merely "interpret" a separate regulatory provision rather than cite the directly applicable standard is accepted, the rulemaking procedures of the Act would be easily circumvented and employers would be deprived of their rights to fair notice and comment. For example, as in the present case, the Secretary could merely adopt a national consensus standard pursuant to Section 6(a) of the Act, and subsequently "interpret" the standard through adjudication in a manner which is inconsistent with the intent of the drafter. This type of rulemaking by adjudication is unfair and deprives employers of the notice and comment opportunity of the Act. *United Steel Workers of America v. Schuylkill Metals*, 828 F.2d 314, 324 (5th Cir. 1987) (Jones, J., dissenting); *Chamber of Commerce of United States v. OSHA*, 636 F.2d 464, 470-71 (D.C. Cir. 1980).

[23] It is important to note that 134(e)(5) was a pre-existing industry standard which was adopted under Section 6(a) of the Act, without regard to the notice and comment rulemaking provisions of Section 6(b) and the Administrative Procedure Act, 5 U.S.C. § 553. App. 43a, n.12. Thus, any deference normally owed to an agency's interpretation of "its own"

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1029(g)(3) as requiring proper fit of a respirator. The Secretary contends that reference to § 1910.134 was intended to include 134(e)(5), despite the fact that 1910.134(b) is entitled *"Requirements for a minimal acceptable program."* App. 111a.

As the Commission correctly concluded, 134(e)(5) cannot be construed reasonably as requiring an employer to assure a proper respirator fit. Rather, 134(e)(5) requires employers to instruct employees on such matters as how to select a respirator, how to put on a respirator, how to achieve a proper fit and how to obtain a face-piece seal. App. 41a. The employees must also receive hands-on experience with the respirators during training. *Id.* This training includes providing each employee with "an opportunity" to wear the respirator in a test atmosphere during training. However, 134(e)(5) does not, as the Secretary argues, require that the employer assure proper fit of the respirator or specify how this is to be done; that safety requirement is covered by 1029(g)(4)(i). *Id.*

In an effort to circumvent the obvious language of the regulatory standard, the Secretary argues that the one reference to "have it fitted properly" contained in

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regulation is reduced, since the Secretary has not promulgated the standard at issue. See *Marshall v. Anaconda Co.*, 596 F.2d 370, 374 (9th Cir. 1979); *Bethlehem Steel Corp. v. OSHRC*, 573 F.2d 157, 160 (3rd Cir. 1978). More importantly, by merely adopting the pre-existing standard without the rulemaking procedures of the Act, the Secretary may not construe a regulatory standard to impose requirements which the standards source did not impose. *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1332 (6th Cir. 1978).

134(e)(5) obligates an employer to assure proper fit of a respirator. This attempted construction, however, ignores the numerous references to "instruction and training" which precede the relied upon phrase and further ignores the fact that, as the ALJ and Commission found, each of the 28 employees were provided "an opportunity" to have their respirators fitted by exposure to isoamyl acetate ("banana oil"). See App. 52a. The plain language of the standard cannot be "interpreted" reasonably to require an employer to assure proper fit, and any attempt by the Secretary to do so is unreasonable.

Moreover, the Secretary is at a complete loss to explain the obvious inconsistency between her interpretation of 134(e)(5) and the plain meaning and language of 1029(g)(4)(i).[24] The Secretary's only attempt to explain this discrepancy is contained in footnote 37 of Petitioner's brief wherein she contends that "in support of the reasonableness of the Secretary's interpretation . . . [n]othing prevents overlapping prohibitions in statutes or regulations." While it is true that "some" overlapping prohibitions may be permissible, the Secretary's "interpretation" of 134(e)(5) would completely encompass the conduct proscribed by 1029(g)(4)(i), thereby rendering the language of 1029(g)(4)(i) superfluous. When the regulatory standards are construed as a whole, it is clear that 1029(g)(3) and 134(e)(5) were

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[24] During testimony, compliance officer Gerald Ryan acknowledged that 1029(g)(4)(i) was directly applicable to the cited condition and that he may have cited the wrong standard. App. 43a. The Secretary, however, did not move to amend, but instead, chose to "interpret" 1029(g)(3) to its benefit. App. 44a.

intended to assure proper training and instruction to employees regarding the selection, use and maintenance of respirators and that 1029(g)(4)(i) was designed to insure the proper fit of respirators. Any other "interpretation" by the Secretary would violate well established rules of construction and be an impermissible "interpretation" of the regulatory standards at issue. See *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965).

Additionally, the Secretary is attempting to rulemake after the fact through adjudication. Section 134(e)(5) was not promulgated by the Secretary, but rather, it was a pre-existing standard which was adopted by the Secretary as a national consensus standard pursuant to Section 6(a) of the Act, without regard to the comment and notice rulemaking procedures under Section 6(b) of the Act or the Administrative Procedure Act, 5 U.S.C. § 553. By allowing the Secretary to adopt a national consensus standard through Section 6(b) of the Act, without normal rulemaking procedures, and subsequently allowing the Secretary to "interpret" the provision to its liking, the Secretary would be permitted to rulemake by adjudication, thereby circumventing the notice requirements and purpose of the rulemaking function.

In footnote 23 of its brief, Petitioner concedes that 134(e)(5) was adopted rather than promulgated by the Secretary; however, Petitioner argues that the selection of a pre-existing standard is itself a policymaking exercise entitling the Secretary's interpretation to deference. This argument by Petitioner confuses the concepts of adoption versus interpretation. While the Secretary's decision to adopt a pre-existing standard which was authored by a

different entity can be viewed as an exercise of its policymaking authority, such a decision does not entitle the Secretary's interpretation of that standard to deference. Indeed, because the Secretary has chosen to adopt pre-existing language rather than promulgate "its own" regulatory standard pursuant to the notice and comment rulemaking procedures of the Act, the Secretary's interpretation of the standard is not entitled to special deference, especially when her interpretation attempts to impose additional requirements not intended by the drafters of the standard and not consistent with the plain language of the regulation. See *Marshall*, 596 F.2d at 374; *Bethlehem Steel Corp.*, 573 F.2d at 160; *Diebold, Inc.*, 585 F.2d at 1332.

Consequently, this case does not present an issue of whether deference is properly owed under the Act to the interpretations of either the Secretary or the Commission; but rather, the issue is whether the Tenth Circuit's judgment properly deferred to the Commission's reasonable interpretation of the regulatory standards at issue, as opposed to the unreasonable interpretation of the Secretary. Because this case presents a question of deference to a reasonable interpretation of the Commission versus an unreasonable interpretation by the Secretary, the judgment of the court of appeals correctly affirmed the Commission's reasonable interpretation of the regulatory standard.

III. A JUDICIALLY CREATED RULE OF DEFERENCE TO THE SECRETARY UNDER ALL CIRCUMSTANCES WOULD UNDERMINE THE PURPOSE AND FUNCTION OF THE COMMISSION AND SHOULD NOT BE ADOPTED BY THIS COURT.

Any rule of deference to the Secretary's interpretation of a regulatory standard over the reasonable

interpretation of the Commission would undermine the purpose for which the Commission was created. Indeed, such a rule of deference would make the Commission a subordinate body with no function other than to make findings of fact and rubberstamp the Secretary's views, a result clearly at odds with the congressional intent of an independent body designed to alleviate business concerns.

Furthermore, any rule of deference to the Secretary's interpretation over the reasonable interpretation of the Commission would allow the Secretary to rulemake by adjudication and encourage the promulgation of genuinely ambiguous regulatory standards. One purpose of rulemaking is to provide affected persons with notice of prohibitive conduct and an opportunity to be heard regarding the promulgation of specific standards. *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969); *Chamber of Commerce of United States v. OSHA*, 636 F.2d 464, 470-471 (D.C. Cir. 1980); *National Petroleum Refiners Association v. F.T.C.*, 482 F.2d 672, 683 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). By creating a judicial rule of deference to the Secretary's interpretation, even when the Commission has reached a reasonable interpretation of an ambiguous regulatory standard, deprives employers of a neutral adjudicator and interpreter, and encourages the Secretary to promulgate ambiguous regulatory standards. Such a rule would eliminate the purpose of amending and clarifying regulations.[25]

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[25] As the court of appeals noted, if the Secretary maintains that a different result should prevail under OSHA, she should

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Thus, even if this Court determines that a reviewing court should not defer to the Commission's reasonable interpretation of an ambiguous regulatory standard, there should be no judicial rule of deference to the Secretary's interpretation under the Act. Consistent with the Third Circuit's approach in *Bethlehem Steel Corp.*,[26] when the Commission and Secretary have reached conflicting interpretations regarding a regulatory standard, the Court should rely upon the plain wording of the standard. 573 F.2d at 160. "If the language is faulty, the Secretary has the means and obligation to amend." *Id.* 573 F.2d at 161.[27] "To strain the plain and natural meaning of words for the purpose of alleviating a perceived safety hazard is to delay the day when the Occupational Safety and Health Regulations will be written in clear and concise language so that employers will be better able to understand and observe them." *Diamond Roofing Co., Inc.*, 528 F.2d at 650. The responsibility to promulgate clear and unambiguous standards is upon the Secretary. *Bethlehem Steel Corp.*, 573 F.2d at 161.

If this Court is compelled to issue a uniform guidance to the various circuit courts regarding the standard

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amend or clarify the regulations through the rulemaking process. App. 11a. The Secretary's argument that the amending process is time-consuming and burdensome is without merit, given that the process is there to serve a purpose, and that purpose should not be circumvented by meritless arguments of inconvenience.

[26] 573 F.2d 157 (3rd Cir. 1978).

[27] See also *Irvington Moore, Division of U.S. Natural Resources, Inc. v. OSHRC*, 556 F.2d 431, 436 (9th Cir. 1977).

of review to be exercised when the Secretary and Commission have reached contrary interpretations of an ambiguous regulatory standard, a rule of deference to the Commission's reasonable interpretation would be consistent with the purposes of the Act. In no event, however, should there be a rule of deference to the Secretary's interpretation under all circumstances, since such a rule would undermine the purpose and function of the Commission, especially when, as in the present case, the Secretary's interpretation is unreasonable at a minimun, in those instances when the Secretary has promulgated a genuinely ambiguous regulatory standard and the Commission has reached a reasonable interpretation which is contrary to the Secretary's interpretation, a reviewing court should be free to scrutinize both interpretations and arrive at the most reasonable interpretation of the standard which is consistent with the notions of due process to employers and the language and intent of the regulation. Such an approach would maintain the separate but distinct roles of the Secretary and the Commission, and at the same time, maintain the integrity and purpose of each arm of the Agency.

CONCLUSION

Based upon the foregoing arguments, CF&I respectfully requests that the judgment of the Tenth Circuit be affirmed. In the alternative, CF&I respectfully requests that the matter be remanded to the Tenth Circuit for consideration of those arguments and challenges made by CF&I which were not addressed by the court of

appeals because of the disposition of the case on the merits.

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